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Supreme Court, U.S.
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NO.

in the Supreme Court of the United States

October Term, 1985

L.B.G. PROPERTIES, INC.,
Petitioner

vs.

CHISHOLM REALTY COMPANY, LTD.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Does a court of appeals have jurisdiction under 28 U.S.C. §158(d) to review a district court's decision which reverses a bankruptcy court's order confirming a Chapter 11 plan of reorganization?

LIST OF PARTIES

The parties to the proceeding below and before this Court are the petitioner L.B.G. Properties, Inc., debtor and debtor in possession, and the respondent Chisholm Realty Company, Ltd. The petitioner is the wholly owned subsidiary of The Holding Company.

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L.B.G. PROPERTIES, INC.,

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vs.

CHISHOLM REALTY COMPANY, LTD.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner L.B.G. Properties, Inc., debtor and debtor in possession, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered

in the proceeding below on November 26, 1985, rehearing denied on February 19, 1986.

OPINIONS BELOW

The decision of the Court of Appeals for the Eleventh Circuit is not reported and is reprinted in the appendix hereto, p. App. 1, *infra*.

The decisions of the United States District Court for the Southern District of Florida and of the United States Bankruptcy Court for the Southern District of Florida likewise are unreported and are reprinted in the appendix hereto, p. App. 3, and p. App. 5, *infra*, respectively.

JURISDICTION

Petitioner commenced a bankruptcy case under Chapter 11 of title 11, United States Code, on July 22, 1983, seeking to reorganize its affairs. On February 22, 1984, the Bankruptcy Court confirmed petitioner's plan of reorganization. See p. App. 5, *infra*.

Respondent appealed to the District Court, which reversed the Bankruptcy Court's confirmation order. See p. App. 3, *infra*. Petitioner when appealed to the Court of Appeals, which dismissed the appeal for lack of appellate jurisdiction. See p. App. 1, *infra*. Petitioner sought rehearing, which was denied on February 19, 1986. See p. App. 2, *infra*.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

28 U.S.C. §158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(2) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

(3) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is appointed or designated under section 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

STATEMENT OF THE CASE

Petitioner is a corporation which acquired an apartment project in Broward County, Florida, from respondent with the intention of converting the rental apartments into condominiums. At the time petitioner acquired the property, it gave respondent a third mortgage on the project to secure the unpaid balance of the purchase price. Subsequently, the market for condominiums deteriorated substantially, and petitioner began having difficulties meeting its obligations. After respondent instituted a mortgage foreclosure action in state court, petitioner filed a petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §1101 *et seq.*, to reorganize its financial affairs.

Petitioner immediately proposed a plan of reorganization, which was attacked at every opportunity by respondent (but not by any other creditor, secured or unsecured). As a result of hearings before the Bankruptcy Court, petitioner amended its plan of reorganization to comply with the findings of the

Bankruptcy Court. The respondent's objections and the Bankruptcy Court's findings are set forth in opinions of the Bankruptcy Court, p. App. 9 and p. App. 15, *infra*. The petitioner's amended plan of reorganization ultimately was confirmed by the entry of the Order Confirming Second Modified Plan of Reorganization, p. App. 5, *infra*.

Respondent appealed the Bankruptcy Court judgment to the District Court. There, respondent attacked the Bankruptcy Court's decision primarily on the basis that the amended plan of reorganization did not give respondent, a dissenting secured creditor, the "indubitable equivalent" of its claim pursuant to the standards for confirmation found in 11 U.S.C. §1129, specifically subsection (b)(2)(A)(iii). Although the Bankruptcy Court had discussed the issue in some detail, pp. App. 9-14, *infra*, the District Court's reversal stated cryptically, "The Second Amended Plan, with particular reference to the standby letter of credit, but not limited to that portion of the plan, does not provide Chisholm [respondent] with the 'indubitable equivalent' of its allowed secured claim, as that term has been defined by Congress." [Citations omitted]. See p. App. 3-4, *infra*. With that, the District Court remanded to the Bankruptcy Court.

Petitioner, aggrieved by the unexplained objection to its plan of reorganization by the District Court, appealed pursuant to 28 U.S.C. §158(d) to the Court of Appeals for the Eleventh Circuit. That court, *sua sponte*, directed the parties to simultaneously brief whether the District Court's reversal was a final, appealable order. Thereafter, the Court of Appeals dismissed the appeal. See p. App. 1, *infra*.

REASONS FOR GRANTING THE WRIT

I.

THE ELEVENTH CIRCUIT'S VIEW OF ITS JURISDICTION IN BANKRUPTCY APPEALS IS TOO NARROW, HINDERS THE EFFICIENT ADMINISTRATION OF BANKRUPTCY CASES, AND CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

Confirmation of a Chapter 11 plan of reorganization by a bankruptcy court conclusively determines all creditors' rights to assets in the bankruptcy estate and ownership rights in the reorganized business; after confirmation, nothing is left to be done except to distribute assets or indicia of ownership of the reorganized debtor according to the plan of reorganization. *In re Pizza of Hawaii, Inc.*, 761 F.2d 1374, 1378 (9th Cir. 1985); 11 U.S.C. §§ 1141, 1142. Thus, the confirmation order is *the* single most conclusive order in a Chapter 11 case. As such, there is no question that a confirmation order entered by a bankruptcy court under the authority of 28 U.S.C. §157(b)(2)(1) is a final order subject to appellate review by the district court under 28 U.S.C. §158(a).

> Of all the possible orders in a chapter 11 bankruptcy case—except, perhaps, an order closing or dismissing the case—the order confirming a plan most nearly fits the Supreme Court's definition of a final order as one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."

In re Pizza of Hawaii, Inc., 761 F.2d 1374, 1378 (9th Cir. 1985) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). *See also Prudence Realization Corp. v. Ferris*, 323 U.S. 650 (1945); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940). However, by dismissing the appeal, the Eleventh Circuit now has held that it cannot review a district court order which concludes that a plan of reorganization confirmed by a bankruptcy court does not meet the standards for confirmation found in 11 U.S.C. §1129 because, it holds, the decision is not a final order entitled to appellate review by 28 U.S.C. §158(d). The result of this conclusion is that the legal sufficiency of the plan of reorganization likely will never be tested before the Eleventh Circuit.

That result follows from the actual mechanics of bankruptcy administration. Upon reversal of an order confirming a plan of reorganization, parties in interest essentially are faced with a choice between (1) formulating a new plan of reorganization which hopefully will pass appellate muster, or (2) liquidation of the debtor's assets and business by having the bankruptcy case converted to a Chapter 7 case or dismissed.

In the first scenario, if the debtor's new reorganization plan meets the approval of the objecting creditors and is confirmed by the bankruptcy court, the debtor hardly can appeal to the district court on the basis that the old plan should have been confirmed if it has any interest in implementing the new plan—a party cannot appeal from a judgment while enjoying the fruits of it. Affirmance of the new plan by the district court presumably then would give the court of appeals jurisdiction to review the le gal sufficiency of the new plan; even if the court of appeals found the old plan, as well as the new one, to be

legally sufficient, it cannot very well vacate the order confirming the new plan and reinstate the order confirming the old plan when distributions and business operations in consummation of the new plan very well may have begun.

In the second scenario, the liquidation of the debtor, the only possible appellate review would be from the order dismissing the case or converting the case to a liquidation case—that review would be meaningful only if the liquidation were stayed pending appeal. The net conclusion is that, under the Eleventh Circuit's view, review must await significant further events in the administration of the bankruptcy estate, events which will change, moderately or severely, the condition of the debtor's business, with the most likely result being the inability to effectuate the old plan of reorganization even if the court of appeals ultimately approves its legal sufficiency.

This position certainly is contrary to that of the Seventh Circuit, which has made clear that a district court order remanding a case to a bankruptcy court for further significant proceedings is not appealable "provided that the order may be *effectively* reviewed on appeal from the bankruptcy court's 'final final' decision." *In re Cash Currency Exchange, Inc.*, 762 F.2d 542, 546 (7th Cir.), *cert. denied*, 106 S.Ct. 233 (1985) (emphasis added). *Cf. United Steelworkers of America Local 1913 v. Union Railroad Co.*, 648 F.2d 905, 910-911 (3d Cir. 1981); *Gold v. Weinberger*, 473 F.2d 1376, 1378 (5th Cir. 1973).

The predicament in which the Eleventh Circuit has placed petitioner follows from its failure to consider the unique characteristics of bankruptcy cases. In their

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excellent discussion of bankruptcy appellate jurisdiction, the authors of Wright, Miller & Cooper, *Federal Practice & Procedure*, §3926 (Supp. 1986) state, at pages 69 and 71:

> The most important concern in defining the final judgment jurisdiction of the courts of appeals is that it not be limited rigidly to the concepts of finality that apply in other settings. In many ways, bankruptcy proceedings justify a distinctive and more flexible definition of finality. The special needs of complex multiparty bankruptcy administration have long justified distinctive rules for timing appeals, and there is no justification for suddenly scrapping the long experience under earlier statutes. In addition, some consideration must be given to the fact that most cases will come to a court of appeals only after a district court or appellate panel has decided the matter as an appellate tribunal. . . .
>
> * * *
>
> A determination to develop a unique concept of finality for bankruptcy appeals of course does not mean that every bankruptcy order is final and appealable when entered. Just as some orders have been found final, others have been found nonfinal and will continue to be found nonfinal. Wise development and application of the bankruptcy concept of finality will require a sophisticated knowledge of substantive bankruptcy law, bankruptcy procedure, and actual bankruptcy administration. . . . It would

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> be surprising in the extreme to discover that the best rules for timing bankruptcy appeals were the same as the best rules for timing appeals in more routine civil litigation.

Case law support for these propositions, and fuller explanations, are found in *In re Saco Local Development Corp.*, 711 F.2d 441 (1st Cir. 1983) and *In re Marin Motor Oil, Inc.*, 689 F.2d 445 (3d Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983), as well as in the cases found in the footnotes to the quoted discussion.

The error of the Eleventh Circuit's narrow view of its jurisdiction under 28 U.S.C. §158(d) is evidenced by its conflict with holdings of the Seventh and Ninth Circuits. In *In re Pizza of Hawaii, Inc.*, 761 F.2d 1374 (9th Cir. 1985), in a discussion at pages 1377-78, the Ninth Circuit squarely holds that it has jurisdiction to review a district court's order vacating a bankruptcy court confirmation order. The Seventh Circuit, without discussion of its appellate jurisdiciton, reversed a district court's reversal and reinstated a bankruptcy court confirmation order. *In re Madison Hotel Associates*, 749 F.2d 410 (7th Cir. 1984). While the result in *Madison Hotel Associates*—the reinstatement of the bankruptcy court confirmation order—clearly exemplifies the benefits of review by the court of appeals, the Ninth Circuit has directly addressed the issue in several opinions. *In re Sambo's Restaurants, Inc.*, 754 F.2d 811 (9th Cir. 1985) adopted a broad view of circuit court jurisdiction under 28 U.S.C. §158(d). There, following the Third and Eighth Circuits (*In re Marin Motor Oil, Inc.*, 689 F.2d 445 (3rd Cir. 1982); *In re Bestmann*, 720 F.2d 484 (8th Cir. 1983)), quoting *Marin Motor Oil*, the Ninth Circuit held that " 'when the bankruptcy court issues what is indisputably

a final order, and the district court issues an order affirming or reversing, the district court's order is also a final order for purposes of section 1293(b).' "[1] 754 F.2d at 814. The gist of the Ninth Circuit's reasoning is found in these excerpts from pages 814-15, with citations omitted:

> [T]he district court is acting as an appellate tribunal in reviewing the trial (bankruptcy) court's final order. The policies underlying the finality requirement in ordinary cases thus do not apply. First, although bankruptcy courts would still have to conduct full adversary proceedings on remand from these types of district court decisions, litigation on these causes of action would be completed and the bankruptcy court would have nothing further to do if we reversed the district court. Moreover, these sort of district court judgments are final in the sense that nothing remains for the district court to do.
>
> Second, our role and that of the district court is essentially the same in this appellate process. We are in as good a position to review the bankruptcy court's decision as is the district court. Thus, when we review a district court decision with respect to a final order of a bankruptcy court, we in essence are reviewing the final order of the bankruptcy court.

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[1] 28 U.S.C. §1293(b), repealed by Pub.L. 87-189, 75 Stat. 417, which added 28 U.S.C. §158, was the predecessor of 28 U.S.C. §158(d), and the operative language read almost identically with the language found in §158(d).

> Third, many of the principal reasons for the finality requirement are based on maintaining the proper relationship between trial and appellate courts. Those reasons are unpersuasive when one appellate court is reviewing another lower appellate court rather than the decision of a fact finder.
>
> Fourth, one of the most compelling reasons for the finality rule is the avoidance of unnecessary appeals and interruptions of trial, thereby saving judicial time and expense. Where the original appeal from the bankruptcy court is from a final judgment rather than from an interlocutory order, however, the delay factor is not compelling.

Many of these same concerns were voiced by the Third Circuit in *In re Marin Motor Oil, Inc.*, 689 F.2d 445, 448-49 (3d Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983).

The Eleventh Circuit's decision below refutes none of these concerns. See p. App. 1, *infra*. In fact, the court's reliance on *TCL Investors v. Brookside Savings & Loan Ass'n.*, 775 F.2d 1516 (11th Cir. 1985), not only fails to address these issues but is misplaced as well—in *TCL Investors*, the Eleventh Circuit noted that the district court had remanded for further fact-finding and that, "[u]ntil the factual record is fully developed, as required by the district court, the issues presented cannot be adequately presented on appeal." 775 F.2d at 1519. In the case below, however, the district court ruled on the merits of petitioner's plan of reorganization and left the bankruptcy court with nothing to do but elicit a new plan of reorganization or a motion to liquidate the

debtor's business. See p. App. 3, *infra.* Simply stated, the Eleventh Circuit, unlike other courts of appeals, has not properly focused upon the legitimate problems found in appellate review of proceedings in bankruptcy cases. Moreover, it has not even followed its own precedent.

II.

THE DECISION BELOW IS NOT ABERRATIONAL BUT REFLECTS THE ELEVENTH CIRCUIT'S CONFUSED CONCEPT OF ITS JURISDICTION.

Recently the Eleventh Circuit has recognized, "In bankruptcy proceedings, it is generally the particular adversary proceeding or controversy that must have been finally resolved, rather than the entire bankruptcy litigation." *In re Charter Co.*, 778 F.2d 617, 621 (11th Cir. 1985). This general comment, however, belies the Eleventh Circuit's approach to review of bankruptcy matters, which is derived from its decision in *In re Regency Woods Apartments, Ltd.*, 686 F.2d 899 (11th Cir. 1982). And it is contradicted by a decision three weeks later in *In re Wisz*, 778 F.2d 762 (11th Cir. 1985), where the Eleventh Circuit held that a district court affirmance of an order overruling a debtor's claim of exemption under 11 U.S.C. §522(b) is not a final order for purposes of its review. The court stated, "Wisz will not be harmed by reserving his appeal on the issue until this court has a final order before it." 778 F.2d at 764. What the Eleventh Circuit failed to explain is what will constitute a final order which will provide an opportunity for review of the exemption issue. *See* Bankruptcy Rule 4003, which establishes the procedure for claiming exemptions and for objecting to claimed

exemptions; Rule 4003(c) states, "After hearing on notice, the [bankruptcy] court shall determine the issues presented by the objections." Furthermore, the Eleventh Circuit did not even acknowledge *In re Barker*, 768 F.2d 191 (7th Cir. 1985) or the cases discussed therein which hold that orders granting or denying exemptions are reviewable by the courts of appeals. As both *Barker* and *In re Brissette*, 561 F.2d 779 (9th Cir. 1977) explain, as a practical matter an order on exemptions is the final resolution of parties' rights. If the property is held to be exempt, there may be little remaining to distribute to creditors to warrant further creditor participation; if the property is held not to be exempt, the bankruptcy trustee presumably would administer the property and sell it. 768 F.2d 193-94; 561 F.2d 781-82.

It is clear from these cases that the Eleventh Circuit has failed to address the realities of bankruptcy cases. *See generally* Wright, Miller & Cooper, *Federal Practice & Procedure*, §3926 (Supp. 1986). Thus, it is not surprising that it has reached the results it has in the proceeding below and in similar cases.

CONCLUSION

For these reasons, this petition for certiorari should be granted, to address important issues of bankruptcy administration and to bring the Eleventh Circuit's misapprehension of its jurisdiction into line with the other courts of appeals.

Respectfully submitted,

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Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-5639

IN RE: L.B.G. PROPERTIES, INC.,
Debtor.

CHISHOLM REALTY COMPANY, LTD.,
Plaintiff-Appellee

versus

L.B.G. PROPERTIES, INC.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

Before GODBOLD, Chief Judge, HILL and ANDERSON, Circuit Judges.

BY THE COURT:

This appeal is DISMISSED. *TCL Inventors v. Bookside Savings & Loan Association*, ____ F.2d ____ (11th Cir. 1985).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-5639

IN RE: L.B.G. PROPERTIES, INC.,
Debtor.

CHISHOLM REALTY COMPANY, LTD.,
Plaintiff-Appellee,

versus

L.B.G. PROPERTIES, INC.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Before GODBOLD, Chief Judge, HILL and ANDERSON, Circuit Judges.

BY THE COURT:

Appellant's petition for rehearing, treated as a motion for reconsideration of the order of November 26, 1985 is DENIED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-896-Civ-EATON

IN RE: L.B.G. PROPERTIES, INC.,
Debtor.

CHISHOLM REALTY COMPANY, LTD.,
Appellant,

vs.

L.B.G. PROPERTIES, INC.,
Appellee.

ORDER OF REMAND

Having heard oral argument of this appeal from the bankruptcy court's confirmation of the Debtor's Second Modified Plan of Reorganization, and of two interlocutory orders related to that confirmation order, and having considered the briefs of counsel and the record, it is

ORDERED and ADJUDGED that this cause be, and the same is, hereby REMANDED to the bankruptcy court for further consideration. Section 1129 of the Bankruptcy Code allows a plan to be confirmed over the objection of an impaired creditor such as Chisholm Realty Company, Ltd. (Chisholm) only if the plan provides the impaired creditor with the "indubitable equivalent" of the allowed amount of its secured claim. The Second Amended Plan, with particular reference to the standby

letter of credit, but not limited to that portion of the plan, does not provide Chisholm with the "indubitable equivalent" of its allowed secured claim, as that term has been defined by Congress. *See S. Rep. No. 2266, S. Rep. No. 95-090,* 95th Cong. 2d Sess. (1978), *citing In re Murel Holding Corp.,* 75 F.2d 941 (2d Cir. 1935) (Learned Hand, J.). *See also, In re American Mariner Industries, Inc.,* 10 Collier Bankr. Cas. 2d 910 (MB) (9th Cir. 1984).

DONE and ORDERED at Miami, Southern District of Florida, this 8th day of July, 1985.

/s/ Joe Eaton
United States District Judge

cc: counsel of record

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-01358-BKC-TCB

[Chapter 11]

In re:

L.B.G. PROPERTIES, INC.
ID# 59-203-5868

Debtor

ORDER CONFIRMING SECOND MODIFIED PLAN OF REORGANIZATION

The second modified plan under chapter 11 of the Bankruptcy Code filed by *L.B.G. Properties, Inc.* on December 15, 1983, CP# 67 and the second modified plan having been transmitted to creditors, equity security holders and Securities and Exchange Commission; and

It having been determined after hearing on notice:

1. That the second modified plan has been accepted in writing by the creditors and equity security holders whose acceptance is required by law; and

2. That the provisions of chapter 11 of the Code having been complied with; that the second modified plan has been proposed in good faith and not by any means forbidden by law; and

3. Each holder of a claim or interest has accepted the amended plan [or will receive or retain under the

second modified plan property of a value, as of the effective date of the amended plan, that is not less than the amount that such holder would receive or retain if the debtor were liquidated under chapter 7 of the Code on such date] [or, the second modified plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted the second modified plan]; and

4. All payments made or promised by the debtor or by a person issuing securities or acquiring property under the second modified plan or by any other person for services or for costs and expenses, or in connection with the second modified plan and incident to the case, will be subject to the approval of the court; and

5. The identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, of the debtor [and an affiliate of the debtor participating in a joint second modified plan with the debtor] [or a successor to the debtor under the second modified plan], after confirmation of the second modified plan, have been fully disclosed, and the appointment of such persons to such offices, or their continuance therein, is equitable, and consistent with the interest of the creditors and equity security holders with public policy; and

6. The identity of any insiders that will be employed or retained by the debtor and his compensation have been fully disclosed; and

7. Confirmation of the second modified plan is not likely to be followed by the liquidation, or the need

for further financial reorganization, of the debtor or any successor to the debtor under the second modified plan];

8. The court shall retain jurisdiction as provided in the second modified plan until there is substantial consummation of the second modified plan. The second modified plan is modified if it calls for retention of jurisdiction beyond that point.

9. *Timothy J. Norris* is named disbursing agent without additional compensation. Bond is waived. He is directed to submit an order for payment of dividends to provide for all payments to be made on the effective date of the second modified plan. When that order is entered, he shall then file a deposit and disbursement statement and submit checks and a bank statement covering the disbursements called for on the effective date of the second modified plan. When all checks have cleared, he shall file a final report and application for final decree.

The Second Modified Plan [CP #67] filed by the debtor on December 15, 1983 is confirmed. Confirmation is subject to the debtor's stipulations noted in the Memorandum Decision of January 18, 1984 [CP #80]. Confirmation is also subject to the condition subsequent noted in the Order Denying Chisholm's Motions entered February 22, 1984 [CP #97], which requires that the debtor refund its second mortgage and make its first distribution as stipulated by its plan not later than February 29, 1984. Jurisdiction is expressly retained to vacate confirmation if condition subsequent is not met.

DONE and ORDERED at Miami, Florida, this 22nd day of February 1984.

/s/ THOMAS C. BRITTON
THOMAS C. BRITTON
Bankruptcy Judge

xc: Debtor
Timothy J. Norris, Atty. for Debtor
Britton, Cohen, Atty. for Chisholm Realty, Creditor

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-01358-BKC-TCB

In re:

L.B.G. PROPERTIES, INC.

Debtor.

MEMORANDUM DECISION (CHISHOLM'S OBJECTION TO CONFIRMATION)

A confirmation hearing was held on December 5 upon this chapter 11 debtor's plan filed August 24. (C. P. No. 18). Chisholm Realty Company Ltd., a New York limited partnership, was the only objector. (C. P. No. 58).

Chisholm's primary objection was that the plan is not feasible, because the success of the plan depends upon the debtor's ability to convert its property (a 183 unit Broward apartment project) into condominiums and to market those units at the projected price and pace. I heard considerable evidence (the transcript is 108 pages) and resolved that contention against Chisholm. (C. P. No. 65). However, Chisholm had also identified three respects in which its contractual rights under its third mortgage were significantly impaired by the plan without an offsetting benefit. For that reason, confirmation was denied under 11 U.S.C. § 1129(b)(2)(A)(iii). The debtor was granted ten days within which to file a modified plan curing these deficiencies. (C. P. No. 65). Within the time stipulated, the debtor filed a Second Modification

of Plan of Reorganization (C. P. No. 67) which cures those deficiencies.

At the continued confirmation hearing held December 19, Chisholm continued its opposition and estimated that it required several hours to present evidence in support of its position. The hearing was, therefore, continued a third time to January 6.

At the January 6 hearing, Chisholm offered testimony again relating to the issue of feasibility. I held that the issue had been tried and resolved and that I would not consider further evidence on that point. Although Chisholm insists that the evidence it wished to present did not relate to the issue of feasibility, Chisholm's summary description of that evidence and the testimony heard before the ruling indicated otherwise.

Chisholm, the former owner of this property, holds a third wrap-around mortgage on the property, which obligates it to satisfy a first mortgage of $1.8 million and a second mortgage of $700,000. Its mortgage was in default when this bankruptcy petition was filed. The bankruptcy frustrated Chisholm's effort to place the project in receivership. It is understandable, therefore, that Chisholm would like to recover possession and control of the property.

The sole issue remaining before me on January 6 was whether the Second Modification cured the three deficiencies noted in the Order Denying Confirmation. However, Chisholm has argued at least six other deficiencies. Out of an abundance of caution, I heard those further objections, which exceeded Chisholm's

filed Objection (C. P. No. 58) and, therefore, might well have been disregarded.

With respect to Chisholm's contention that there is no "undubitable equivalent" provided under the plan, as amended, of the debtor's contractual obligation to sell at least 80,000 square feet of condominiums (49% of the project), before closing any condominium conversion sales I am persuaded that confirmation of this plan must be conditioned upon the debtor's stipulation made before me on January 6 that it remains bound by that contractual stipulation.

With respect to Chisholm's contention that unless the condominium conversion is conducted in phases accompanied by approved replatting of the property, conversion will cause the property taxes to increase by approximately $140,000 I will condition confirmation upon the debtor's stipulation made before me on January 6 that it will phase and replat the project as demanded by Chisholm.

Only one of Chisholm's remaining objections merits specific comment. Paragraph 6 of the Modification of Mortgage dated September 15, 1982 between these parties provides that:

> "Principal payments under the Note in the amount of $1,200,000, . . . shall have been paid or shall be accelerated to be due not later than a date six months after the execution of the consent [to condominium conversion] . . ."

Chisholm argues that the plan provides no "indubitable equivalent" of that stipulation. The debtor argues that

Chisholm's mortgage as modified contemplates that and the debtor's plan provides that the existing first mortgage ($1.8 million) must be and will be fully satisfied before any part of the property can be marketed as a condominium, and that by its projections, the first mortgage will have been completely satisfied by the date the $1.2 million becomes payable to Chisholm. Chisholm insists that the stipulation for payment of $1.2 million is in excess of and unrelated to the obligation to satisfy the first mortgage. Chisholm argues that it is entitled to this payment because condominium conversion materially depreciates its security.

The contractual stipulation is not explicit. Because it was drafted by Chisholm, ambiguity must be resolved against Chisholm. I construe the mortgage as modified to require that the debtor must have paid not less than $1.2 million not later than a date six months after the execution of consent to condominium conversion, but that Chisholm, is obliged (by paragraph 39 of the mortgage) to satisfy the first mortgage by payment in full in order to effect condominium conversion. The contractual agreement clearly contemplates that the debtor will have the option of condominium conversion. Therefore, I construe the agreement to require that upon the debtor's election to convert the property to condominiums, Chisholm must apply payments received from the debtor toward satisfaction of the first mortgage as required to prevent frustration of the condominium conversion and that such payments must be credited toward the debtor's obligation to pay the $1.2 million.

If, therefore, by the time the $1.2 million falls due, the first mortgage has been satisfied, the debtor's obligation to pay $1.2 million will have been satisfied.

If, however, the debtor's projections are not realized and the first mortgage remains unsatisfied when the $1.2 million payment falls due, the debtor remains contractually obligated to make good the shortfall at that time.

In arriving at the foregoing construction, I have attempted to give reasonable effect to the entire document as modified and the intent of the parties as reflected by that document.

I find and conclude, therefore, that the debtor's plan (subject to the stipulated modifications referred to above) meets the requirements of §1129(b)(2)(A)(iii) with respect to its treatment of Class IV (Chisholm) and, therefore, the cramdown provision of §1129(b)(1) is applicable with respect to Chisholm's claim.

Although the debtor's counsel has represented that all other classes affected by the plan have accepted the plan by the requisite margin, by a separate order I reserve ruling on confirmation until the debtor certifies that fact and until the Clerk of this Court confirms that certification. This routine order also requires a deposit in escrow of sufficient funds to satisfy the first distrubution required under the plan.

Subject to the debtor's compliance with that order, therefore, the debtor's plan will be confirmed.

DONE and ORDERED at Miami, Florida, this 18th day of January, 1984.

/s/ Thomas C. Britton

Thomas C. Britton
Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 85-01358-BKC-TCB

In re:

L.B.G. PROPERTIES, INC.

Debtor.

ORDER DENYING CHISHOLM'S MOTIONS

Three motions filed by a secured creditor, Chisholm, were heard on February 13.

1. The motion for rehearing (C. P. No. 88) addressed to the Memorandum Decision (Chisholm's Objection to Confirmation) (C. P. No 80) entered January 18 is denied.

2. The motion for an order requiring the debtor to file a third modification of its plan and an amended disclosure statement (C. P. No. 87) is bottomed on the fact that on January 18 (C. P. Nos. 80, p. 3) I conditioned confirmation of the Second Modified Plan (C. P. No. 67) upon the debtor's stipulation before me on January 6 that it would comply with two demands made by Chisholm at that hearing. The debtor agreed that it remained bound by a contractual stipulation in Chisholm's mortgage and that it will phase and replat its condominium conversion, this ameliorating or delaying any property tax increase.

Neither stipulation required modification of the debtor's plan. If either did, neither adversely changed

the treatment of the claim of any creditor or any other party. The stipulation merely made explicit on this record the debtor's existing implicit obligations.

I do not agree with Chisholm that §1127(a) requires that the debtor file a modification and an amended disclosure statement for these stipulations to be binding upon the debtor. It is clearly sufficient that the stipulation be reflected in the court's order. §1141(c). Nor do I agree that these stipulations entitle Chisholm to reargue the feasibility of the debtor's Plan. The motion for an order requiring the debtor to file a third modification of its plan is denied.

3. Chisholm's objection to the debtor's report on the amount to be deposited before confirmation and its motion to dismiss the case (C. P. No. 91) rests upon the Order Reserving Ruling on Confirmation entered January 16. (C. P. No. 79). It is my practice to use the discretion granted in B.R. 3020(a), to require deposit before confirmation of the money to be distributed after confirmation. This order so provided and reserved discretion to dismiss the case if the debtor failed to comply.

In this instance, the routine order was not appropriate. An essential element of this debtor's plan is the refunding of the existing second mortgage, providing $700,000 in new funds and satisfying part of Chisholm's claim. Of course, as a practical matter, this mortgage cannot be refunded before confirmation. It is unreasonable to require the debtor to deposit those funds before confirmation. The motion to dismiss is denied.

The Order of January 16 is modified to require that the debtor refund its second mortgage and make its first distribution as stipulated by its plan not later than February 29. The debtor is excused from making a deposit before confirmation.

The debtor's Second Modified Plan filed December 15, 1983 (C. P. No. 67) is being confirmed by a separate Order. That Order will reserve jurisdiction to vacate confirmation if the condition subsequently imposed by this Order is not met by the debtor by February 29.

DONE and ORDERED at Miami, Florida, this 16th day of February, 1984.

/s/ Thomas C. Britton

Thomas C. Britton
Bankruptcy Judge

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Supreme Court, U.S.
FILED
JUN 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1918

in the Supreme Court of the United States

October Term, 1985

L.B.G. PROPERTIES, INC.,

Petitioner

vs.

CHISHOLM REALTY COMPANY, LTD.,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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30 pp

QUESTION PRESENTED

Does a court of appeals have jurisdiction under 28 U.S.C. §158(d) to review a district court decision which reverses a bankruptcy court order confirming a Chapter 11 plan of reorganization and remands the proceeding to the bankruptcy court for further consideration?

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NO. 85-1918

in the Supreme Court of the United States

October Term, 1985

L.B.G. PROPERTIES, INC.,

Petitioner

vs.

CHISHOLM REALTY COMPANY, LTD.,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The respondent Chisholm Realty Company, Ltd. ("Respondent"), a secured and unsecured creditor of the Debtor-in-Possession L.B.G. Properties, Inc. ("Petitioner"), respectfully submits this its Brief in

Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Eleventh Circuit, entered in the proceeding below on November 26, 1985, is not reported and is reprinted in the Petitioner's Appendix to Petition, pet. App. 1. The decision of the Court of Appeals for the Eleventh Circuit on Motion for Reconsideration, rehearing denied on February 19, 1986, is not reported and is reprinted in the Petitioner's Appendix to the Petition, pet. App. 2.

The decisions of the United States District Court for the Southern District of Florida and of the United States Bankruptcy Court for the Southern District of Florida are unreported and are reprinted in the Petitioner's Appendix to the Petition, pet. App. 3, pet. App. 5, pet. App. 9, and pet. App. 15.

JURISDICTION

The Respondent notes that the Bankruptcy Court confirmed the Petitioner's Second Modified Plan of Reorganization and that, thereafter, the Respondent appealed to the District Court. See pet. App. 5; see also pet. App. 3. On appeal, the District Court did not simply reverse the Bankruptcy Court's confirmation order but by "Order of Remand," remanded the confirmation proceedings to the Bankruptcy Court for further consideration of that portion of the plan relating to the provision of the indubitable equivalent of the allowed amount of Chisholm's secured claim.

Other than the above-noted clarifications, the Respondent has no objection to the Petitioner's jurisdictional statement.

STATEMENT OF THE CASE

With the exception of certain unnecessarily argumentative language contained therein, the Respondent has no substantial objection to the Statement of the Case submitted by the Petitioner. The Appendix portion of the Petitioner's Petition contains the pertinent lower court orders, which, in their aggregate, supply this Court with sufficient information upon which to reach a just and proper resolution of this matter. The argumentative suggestions made by the Petitioner that the Respondent's objections to the Plan of Reorganization were unfounded and that the District Court's treatment of this matter was cryptic and unexplained do not find any support whatsoever in the record presented by Petitioner in the Appendix to its Petition. The District Court's Order of Remand is clear and concise in its requirement that the Bankruptcy Court give further consideration to the position of Chisholm, as an impaired creditor, by way of a reexamination of the indubitable equivalent provisions of the plan. See pet. App. 3. The objections of Chisholm, the Respondent herein, stem, in substantial part, from the fact that under the plan, as modified, the Respondent is subject to the cramdown provisions of 11 U.S.C. §1129(b)(1). It is a rare creditor, indeed, who does not oppose a plan of reorganization, when such creditor is subject to the severe provisions of the cramdown. See pet. App. 13.

REASONS FOR DENYING THE WRIT

I.

THE ELEVENTH CIRCUIT'S VIEW OF ITS JURISDICTION IN BANKRUPTCY APPEALS IS PRUDENT, FOSTERS THE EFFICIENT ADMINISTRATION OF BANKRUPTCY CASES, AND NOW REPRESENTS THE PREVAILING VIEW AMONG THE CIRCUITS.

The petitioner filed its Voluntary Petition for Relief under Chapter 11 of Title 11 U.S.C, on July 22, 1983. On February 22, 1984, the Bankruptcy Court confirmed the Petitioner's Second Modified Plan of Reorganization, subject to certain conditions subsequent and over the objections of Respondent. See pet. App. 7.

The Respondent appealed the Bankruptcy Court's Order of Confirmation to the District Court and, upon consideration of the appeal, the District Court entered an "Order of Remand" directing that the cause be remanded to the Bankruptcy Court for further consideration. See pet. App. 3. At the heart of the District Court Order of Remand was the directive that the Bankruptcy Court reconsider the critical factual and legal issue of indubitable equivalence, as contemplated by Section 1129 of the Bankruptcy Code and as that issue pertained to the secured claim of Respondent, an impaired creditor subject to the cramdown provisions of 11 U.S.C §1129(b)(1). See pet. App. 3 and pet. App. 13.

Subsequently, the Petitioner sought appeal before the United States Court of Appeals for the Eleventh Circuit. On November 26, 1985, the Eleventh Circuit

dismissed the appeal on authority of *TCL Investors v. Brookside Savings & Loan Association*, 775 F.2d 1516 (11th Cir. 1985).

The Petitioner has attacked, with a vengeance, the Eleventh Circuit decision of *TCL Investors*. In Part I of the Petition, the Petitioner suggests that *TCL Investors* conflicts with decisions of other circuit courts of appeals and attempts to portray *TCL Investors* as little more than an aberration. In Part II of the Petition, the Petitioner retracts its suggestion that *TCL Investors* represents an aberration and presents *TCL Investors*, not as an aberrational decision, but as reflecting the Eleventh Circuit's internally confused and inconsistent concept of its jurisdiction.

The Order of Remand of the District Court remands the confirmation proceedings to the Bankruptcy Court for a reconsideration of critical factual and legal issues, not purely legal issues and, most certainly, not ministerial determinations. The Eleventh Circuit Court of Appeals rightly dismissed this appeal on authority of *TCL Investors*, *supra*.

In *TCL Investors*, the District Court reversed the Bankruptcy Court's order which directed the Chapter 11 debtor, TCL Investors, to sell certain property to Brookside Savings & Loan. The District Court remanded the case on the grounds that the Bankruptcy Court must conduct an adversary proceeding (see Bankruptcy Rule 7001) in order to grant the relief requested by Brookside. On appeal to the Eleventh Circuit Court of Appeals, the Circuit dismissed the appeal for lack of jurisdiction under 28 U.S.C. §158(d). *TCL Investors*, 775 F.2d at 1517. The Eleventh Circuit held "that the district court's remand

required significant judicial activity by the bankruptcy court involving considerable discretion and therefore was not finally dispositive of the merits of the case." 775 F.2d at 1518. The Eleventh Circuit noted the difference between an order which merely affirms or reverses a lower court order and one that reverses *and remands* for further factual development, or "significant judicial activity." *Id.* at 1518–1519. In *TCL Investors* the order of remand of the District Court did not fall within the definition of a final order as "'one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' *In re Tidewater Group, Inc.*, 734 F.2d 794, 795–796 (11th Cir. 1984), quoting *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945)." Id. at 1519.

The holding of *TCL Investors*, that an order of remand which requires significant judicial activity and discretion by the trial (bankruptcy) court is not a final order and, therefore, not appealable under 28 U.S.C. §158(d), now represents the prevailing view among the circuits. And, in the case at bar, one can think of few issues in a Chapter 11 confirmation proceeding which require more significant judicial activity than the reconsideration of the issues of the indubitable equivalent under 11 U.S.C. §1129(b)(2)(A)(iii) and the cramdown provisions of 11 U.S.C. §1129(b)(1). See also, generally, *In re Murel Holding Corp.*, 75 F.2d 941 (2d Cir. 1935) (Learned Hand).

An examination of recent decisions from various circuit courts of appeals discloses that the Eleventh Circuit's view of its jurisdiction is in harmony with the prevailing view among the circuits. The characterization

of the Eleventh Circuit's view as an aberration is inaccurate and is predicated on a misreading or nonreading of decisions from other circuits. The remainder of Part I of this brief examines the law of the circuit courts of appeals.

The First Circuit Court of Appeals in *In re Saco Local Development Corp.*, 711 F.2d 441 (1st Cir. 1983), on a direct appeal to the Court of Appeals from the Bankruptcy Court, concluded that a bankruptcy court order allowing a claim of priority payment constituted a final judgment, order, or decree under 28 U.S.C. §1293(b), because that order conclusively determined the respective rights of the parties to a separate and discrete controversy. 711 F.2d at 445–446. Acknowledging that bankruptcy cases are inherently multiparty proceedings, the First Circuit also recognized that, within a bankruptcy case, there may be controversies "which stand sufficiently apart from the rest of the litigation to warrant treating an order which resolves [that controversy] as 'final' and appealable." *Id.* at 444. *Saco Local Development* does not support the position of the Petitioner because the order involved in that case resolved a separate and discrete controversy. Furthermore, the appeal in *Saco Local Development Corp.* was a direct appeal from the Bankruptcy Court to the Court of Appeals by agreement of the parties and, hence, did not involve the reversal and remand to a bankruptcy court by an intermediate appellate court.

The Petitioner has not cited a decision from the Second Circuit Court of Appeals on the finality of bankruptcy appeals and Respondent's research has not disclosed a decision from that circuit which would shed further light on this petition.

The citation by the Petitioner to the Third Circuit Court of Appeals decision, *Matter of Marin Motor Oil, Inc.*, 689 F.2d 445 (3rd Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983) is misplaced. In *Marin Motor Oil*, the Bankruptcy Court entered an order declaring that a creditors committee did not have the right to intervene in a bankruptcy, adversary proceeding. The District Court reversed this order and the Third Circuit Court of Appeals affirmed, holding that a creditors committee in a bankruptcy reorganization does have the right to intervene in an adversary proceeding instituted by a bankruptcy trustee. 689 F.2d at 446. The Third Circuit, which declared that an order granting intervention is ordinarily not a final order appealable as of right, assumed jurisdiction over the appeal under the rationale that a reversal of the District Court's order by the Circuit Court would effectively preclude the committee from further participation in the adversary proceeding. *Id.* at 448.

Marin Motor Oil, Inc. cannot be read as expansively as the Petitioner suggests. The Third Circuit expressly stated that it was "reluctant... to adopt an expansive interpretation of finality." *Id.* at 448. The Circuit stated: "But it is important to stress the limited nature of our holding on jurisdiction. We hold only that when the bankruptcy court issues what is indisputably a final order, and the district court issues an order affirming or reversing, the district court's order is also a final order for purposes of Section 1293(b)." *Id.* at 449. The Third Circuit did not address a situation of a reversal and remand for further consideration.

The Petitioner has not cited any decision from the Fourth Circuit Court of Appeals and the research of the

Respondent has not disclosed a significant decision from that Circuit on the issue presented.

The Fifth Circuit's view of its jurisdiction is entirely consistent with that of the Eleventh Circuit. See, *TCL Investors*, 775 F.2d at 1518, citing *In Re Emerald Oil Company*, 694 F.2d 88, 89 (5th Cir. 1982). The view of the Fifth Circuit Court of Appeals of finality of bankruptcy appeals was initially expressed in the Circuit's leading decision, *In re Emerald Oil Company*, 694 F.2d 88 (5th Cir. 1982), in which the Fifth Circuit dismissed an appeal taken from the District Court, which had reversed the Bankruptcy Court's award of summary judgment in favor of a creditor. The Court of Appeals ruled that the reversal by the District Court did not constitute a final judgment but, in effect, returned the proceeding to the Bankruptcy Court for a final determination of the rights of the parties. 694 F.2d at 89.

In *In re Barrier*, 776 F.2d 1298 (5th Cir. 1985), the Bankruptcy Court had confirmed a debtor's plan of reorganization over the objection of a creditor bank. The District Court denied a stay pending appeal of the Bankruptcy Court's Order. The Fifth Circuit declared that the District Court decision to deny the stay pending appeal was not a final order and cited, inter alia, the Eleventh Circuit decision, *In re Regency Woods Apartment, Ltd.*, 686 F.2d 899, 901 (11th Cir. 1982). 776 F.2d at 1299. The Court of Appeals did, however, issue a mandamus to the District Court, on a finding that there was serious potential for irreparable harm to the objecting creditor. *Id. Barrier* is entirely consistent with the decision by the Eleventh Circuit in this case. There is no issue here of irreparable harm, and certainly no showing of such. The effect of the

Order of Remand by the District Court is that the status quo can be maintained pending further consideration by the Bankruptcy Court on confirmation of Petitioner's plan.

The Petitioner has not pointed out a decision from the Sixth Circuit Court of Appeals and Respondent's research has not disclosed an opinion of significant bearing from that Circuit.

The leading decision from the Seventh Circuit Court of Appeals on the finality of bankruptcy appeals is *Matter of Riggsby*, 745 F.2d 1153 (7th Cir. 1984), which the Petitioner has failed to cite to this Court in its Petition. In *Riggsby*, the District Court reversed a Bankruptcy Court dismissal of a creditor's complaint objecting to discharge of the debtor and remanded the case for further proceedings. The appeal by the debtor was dismissed by the Seventh Circuit, which declared that "[a]lthough the order of the bankruptcy judge rejecting the bank's complaint...was final within the meaning of the appeal statute, we have jurisdiction of the district court's order reversing the bankruptcy judge only if that order was final too." 745 F.2d at 1155. The Seventh Circuit noted, moreover, that "the majority of circuits hold, very sensibly in our view, that remands by the district court to the bankruptcy judge are not appealable in cases such as the present where the bankruptcy judge is the decider, and not just the recommender of the decision. [Citations omitted]." Id.

The Seventh Circuit, in *Riggsby*, took into account the fact that most proceedings in bankruptcy cases "are summary, remands usually take little time to complete and it is therefore more efficient to wait" until the remand is

concluded. *Id.* at 1155–1156. The view of the Seventh Circuit fosters efficient administration of bankruptcy cases in that, depending on the outcome of the remand, "there might be no appeal at all, and in any event there would be no chance of two appeals -- one from the order of remand and the other from whatever order the district judge entered on appeal from the bankruptcy judge's final decision following remand." *Id.* at 1156. In language strikingly similar to the language appearing in the Eleventh Circuit's decision of *TCL Investors, supra,* at 1518, the Seventh Circuit held "that a decision of the district court on appeal from a bankruptcy judge's final order is not itself final if the decision remands the case to the bankruptcy judge for significant further proceedings." 745 F.2d at 1156.

Three other decisions from the Seventh Circuit warrant brief comment. First, *Matter of Madison Hotel Associates*, 749 F.2d 410 (7th Cir. 1984), cited by the Petitioner, did not address the issue of finality of bankruptcy and district court orders and, accordingly, does not provide authority for consideration on the instant petition. Second, in *Matter of Cash Currency Exchange, Inc.*, 762 F.2d 542 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 233 (1985), the Seventh Circuit addressed the question of whether six different orders entered by the Bankruptcy Court and appealed to the District Court were final orders or not. A common thread running throughout the *Cash Currency Exchange* opinion was the distinction between the adversary proceeding, which constitutes a separate and discrete controversy with a defined plaintiff and a defined defendant, on the one hand, and the broader, multiparty Chapter 11 case, which requires a consideration of multiple interests. See 762 F.2d at 546. Importantly, the Seventh Circuit declared that "a district court's decision on

an appeal from a bankruptcy court's final order will be reviewed only if it also is final. *Riggsby*, 745 F.2d at 1155. Thus, an order by the district court remanding the case to the bankruptcy court for further significant proceedings will not be automatically and immediately appealable to this court, provided the order may be effectively reviewed on appeal from the bankruptcy court's 'final final' decision. Id. at 1156." 762 F.2d at 546.

A recent decision from the Seventh Circuit, *Matter of Barker*, 768 F.2d 191 (7th Cir. 1985), albeit cited by the Petitioner, lends additional support to the position of the Respondent herein. *Matter of Barker* reiterated and reaffirmed the principle that where the district court reverses and remands the given matter for further proceedings, the district court's order remanding the case would not normally be considered a final order or judgment. An order of remand, in the Seventh Circuit's view, would not be final unless "all that remained to be done on remand was a purely mechanical, computational, or minsterial task that was unlikely to result in a new appeal or to effect issues that the losing party might want to raise on appeal following the remand." 768 F.2d at 193. See also, *Matter of Fox*, 762 F.2d 54, 55-56 (7th Cir. 1985)

Although the Petitioner has cited the Eighth Circuit decision, *In re Bestmann*, 720 F.2d 484 (8th Cir. 1983), the Petitioner has omitted to bring to the attention of this Court the leading decision of the Eighth Circuit, *Matter of Hansen*, 702 F.2d 728 (8th Cir. 1983), *cert. denied*, 103 S.Ct. 3539 (1983). *Bestmann* presented the Eighth Circuit with a separate and distinct controversy between designated parties to an adversary proceeding. The Eighth

Circuit declared that the order of the trial (bankruptcy) court was a final order that completely disposed of the complaint and finally determined the rights of the parties to the adversary proceeding and that, accordingly, the District Court erred in dismissing an appeal taken from the Bankruptcy Court order. In *Bestmann*, the Eighth Circuit ruled that the Bankruptcy Court's order finding that the defendant bank, not the plaintiff Bayer, was entitled to proceeds from the sale of hogs was a final, conclusive order. *Id.* at 486. On the other hand, the Eighth Circuit, in *Matter of Hansen*, confronted a situation more analogous to the one presented by this Petition. *Hansen* held that District Court orders of remand are not final, automatically appealable orders. 702 F.2d at 729.

The Ninth Circuit has perhaps generated the most controversy in the area of finality of bankruptcy appeals. More importantly, the Ninth Circuit, in a line of several decisions, seems to have come full circle on the issue of finality. Through its discussion of only three of the six decisions from the Ninth Circuit, the Petitioner has presented this Court with only half the circle.

Brief note may be taken first of *Matter of Brissette*, 561 F.2d 779 (9th Cir. 1977) which held that exemption disputes in bankruptcy cases constitute proceedings from which interlocutory appeals may be taken. *Brissette* is, however, a decision rendered under the Bankruptcy Act of 1898, as amended; specifically, the appellate jurisdictional provisions of that Act (see 11 U.S.C. §47(a)) and, hence, does not require extended comment.

The full circle evidenced in the Ninth Circuit decisions appears to begin with *In re Martinez*, 721 F.2d

262 (9th Cir. 1983). In *Martinez*, a Bankruptcy Appellate Panel affirmed, in part, the order of the Bankruptcy Court but remanded the case for further, factual determinations. The Ninth Circuit Court of Appeals dismissed the appeal holding that the remand by the Bankruptcy Appellate Panel to the Bankruptcy Court for clarification of a central issue to the case did not constitute a final decision appealable as of right. As the Ninth Circuit declared in *Martinez*: "Courts have traditionally not considered remands as final decisions because of their preference to have a single 'ultimate review on all the combined issues.' [citations omitted]." 721 F.2d at 265. Quoting this Court's definition of a final decision, as "one which 'ends the litigation on the merits and leaves nothing for the court to do but enter judgment. *Catlin v. United States*, 324 U.S. 229, 233, 65 S.CT. 631, 633, 89 L.Ed. 911 (1945)," the *Martinez* decision recognized that "[t]he finality doctrine is based on the twin policies of controlling piecemeal adjudication and eliminating the delays caused by the appeal of interlocutory decisions. [Citations omitted]." 721 F.2d at 265. The issue on remand, in *Martinez*, being the determination of the form of tenancy to the debtors' homesteaded residence was as critical and central an issue to the determination of the rights of the parties as the remanded determination of indubitable equivalence in the case at bar.

In *In re Sambo's Restaurant, Inc.*, 754 F.2d 811 (9th Cir. 1985), the Ninth Circuit assumed jurisdiction over an appeal and affirmed the District Court order which reversed the Bankruptcy Court order denying a motion to amend an informal proof of claim. The Ninth Circuit focused not on the District Court's disposition of the matter but on the Bankruptcy Court's order denying the motion to amend and considered that Court's order a final

judgment because it effectively resulted in the dismissal of the entire claim made. *Id.* at 813.

Three months following *Sambo's Restaurants*, the Ninth Circuit reviewed a decision by the District Court, which had vacated and remanded to the Bankruptcy Court a bankruptcy court order of confirmation. See *Matter of Pizza of Hawaii, Inc.*, 761 F.2d 1374 (9th Cir. 1985). In *Matter of Pizza of Hawaii, Inc.*, it is important to note that two substantive issues were inextricably tied together, and this, undoubtedly, had an impact on the determination as to whether the Ninth Circuit should assume jurisdiction. The two substantive issues were whether the plan proposed by the debtor was feasible and, in that regard, whether a certain creditor had filed sufficient and proper documents to constitute an amendable, informal proof of claim to be considered on the question of feasibility. The Bankruptcy Court had confirmed the Chapter 11 debtor's plan, but the District Court vacated and remanded confirmation because the informal claim of the creditor had not been considered by the Bankruptcy Court on confirmation. Ultimately, the Ninth Circuit affirmed the District Court's order vacating confirmation of the plan and remanding for reconsideration of the plan's feasibility. *Id.* at 1382.

The full circle in the Ninth Circuit is completed by two, more recent cases, *In re Stanton*, 766 F.2d 1283 (9th Cir. 1985) and *In re 405 N. Bedford Dr. Corp.*, 778 F.2d 1374 (9th Cir. 1985). With its decision in *In re Stanton*, the Ninth Circuit Court of Appeals has finally and clearly adopted a concept of finality and appellate jurisdiction more in line with other circuit courts of appeals. In *Stanton*, the Court declared, in straightforward terms, "that the finality issue must be examined at two levels..., first,

to see whether the order of the bankruptcy court was final [citations omitted], and second, to whether the decision of the BAP [or district court] is final, [citations omitted]. Both decisions must be final." 766 F.2d at 1285. The view expressed by the *Stanton* Court is entirely in accord with the Eleventh Circuit Court of Appeals view and comprises a significant departure from the broad declarations of *Sambo's Restaurants, Inc.* and *Pizza of Hawaii, Inc.* Notwithstanding the attempt on the part of the Ninth Circuit to reconcile the positions taken in the earlier decisions of *Sambo's*, on the one hand, and *Martinez*, on the other hand, the Ninth Circuit has now come full circle to follow the *Martinez* decision. See, *In re Riggsby, supra*, at 1155; see also, *TCL Investors, supra*, at 1518–1519.

Most recently, in *In re 405 N. Bedford Corp.*, 778 F.2d 1374, an appeal was taken from the District Court order which affirmed a bankruptcy court's order resolving two motions. The appeal to the Ninth Circuit was dismissed on the grounds that where "further proceedings in the bankruptcy court will affect the scope of the order, the order is not subject to review in this court under [section 158]. 778 F.2d at 1377. See also, *In re Four Seas Center, Ltd.*, 754 F.2d 1416, 1418, (9th Cir. 1985).

Finally, the Tenth Circuit Court of Appeals, in a decision rendered prior to publication of the Ninth Circuit's *Stanton* decision, has recently adopted the view that a "decision of the district court on appeal from a bankruptcy judge's final order is not itself final if the decision remands the case to the bankruptcy judge for significant further proceedings...." *Matter of Commercial Contractors, Inc.*, 13 B.C.D. 691, 692 (10th Cir. 1985),

quoting *In re Riggsby*, 745 F.2d at 1156. In *Commercial Contractors, Inc.*, the District Court, on appeal from the Bankruptcy Court, reversed the lower court order denying a motion to intervene, vacated the Bankruptcy Court approval of a settlement and remanded the matter to the Bankruptcy Court. The appeal was dismissed by the Tenth Circuit, which concluded that an order of remand is not a final order and, therefore, appellate jurisdiction does not obtain. 13 B.C.D. at 692-693.

The Petitioner has not cited any pertinent decisions from the District of Columbia Circuit Court of Appeals and Respondent's research has not revealed any.

The decisions from various circuit courts of appeals on the finality issue of bankruptcy appeals discloses a substantial harmony among the circuits. The courts appear cognizant of the fact that proceedings in bankruptcy are normally summary and remands take little time. *See, e.g., Commercial Contractors, Inc., supra*, at 692. The decisions, moreover, and at least tacitly, recognize that in the absence of a clearly defined, separate controversy, such as an adversary proceeding, events subsequent to an appeal in a bankruptcy case may frequently outrun the original issues in the initial appeal due to the unique nature of bankruptcy cases, which are inherently multiparty, multifaceted proceedings. *See, e.g., Cash Currency Exchange, Inc., supra*, at 545-546; *see also, generally, Hadley v. Victory Construction Company, Inc.*, 11 B.C.D. 749, 753 (BAP 9th Cir. 1984). The rule that both the trial court and the intermediate appellate court decisions must be final in order to maintain an appeal under 11 U.S.C. §158(d) fosters the policies of eliminating delay and of controlling piecemeal litigation and reflects

the wisdom of the circuits that, depending on the outcome of a remand, there may be no appeal at all or, in any event, not two appeals. *See, Riggsby, supra*, at 1156. Judicial economy is well served.

II.

THE DECISION BELOW REPRESENTS THE ELEVENTH CIRCUIT'S COHERENT AND CONSISTENT CONCEPT OF ITS JURISDICTION.

The Eleventh Circuit decision, *In re TCL Investors*, 775 F.2d 1516, is consistent with previous decisions from the Eleventh Circuit, which, in the aggregate, constitute a coherent concept of appellate jurisdiction. The law of the Eleventh Circuit, as initially expressed in *In re Regency Woods Apartments, Ltd.*, 686 F.2d 899 (11th Cir. 1982) and most recently expressed in *In re TCL Investors, supra*, is that where a district court's remand requires "significant judicial activity" by the bankruptcy court involving considerable discretion, the district court's order is not final, but interlocutory, and not appealable as of right under Section 158(d). In *Regency Woods Apartments, Ltd.*, the District Court reversed a Bankruptcy Court order and remanded the case to the Bankruptcy Court with directions to give further consideration to the issues presented, i.e., adequate protection and an accounting for post-petition use of cash collateral. 686 F.2d at 902. In *TCL Investors*, the Eleventh Circuit held that the District Court's order reversing and remanding the case to the Bankruptcy Court for further proceedings on an order of the Bankruptcy Court, which had directed the debtor to sell certain property, was not a final order. Rather, the District Court's order required significant judicial activity by the Bankruptcy Court. 775 F.2d at 1519.

In the case at bar, significant judicial activity by the Bankruptcy Court is required by the District Court's Order of Remand, as well. The District Court's Order of Remand, far from resolving the merits and far from leaving nothing more for the Bankruptcy Court to do than to execute judgment directs the Bankruptcy Court to give further and considerable reconsideration to the question of providing the Respondent with the indubitable equivalent of its allowed secured claim. See *TCL Investors*, 775 F.2d at 1519.

Because the District Courts in *Regency Woods Apartments, supra,* and *TCL Investors, supra,* reversed and remanded for further consideration, the Eleventh Circuit Court of Appeals dismissed the appeals in both decisions. Similarly, in *Matter of Wisz*, 778 F.2d 762 (11th Cir. 1985) and in *In re The Charter Company*, 778 F.2d 617 (11th Cir. 1985) the appeals to the Eleventh Circuit were dismissed on jurisdictional grounds. To the extent that *Wisz, supra,* and *Charter Company, supra,* have any bearing on the petition at the bar, those two decisions are entirely consistent with the Eleventh Circuit's view of its jurisdiction expressed in *Regency Woods Apartments, supra,* and *TCL Investors, supra.* The Eleventh Circuit's view of finality in bankruptcy appeals, and its decision in this case, is in complete harmony with the prevailing view among the circuits and is internally consistent law.

CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served opposing counsel of record in the foregoing matter with three copies of the Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit by forwarding copy of same by U.S. Mail, with adequate postage thereon, addressed to:

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This 18th day of June, 1986.

Edwin Marger